Supreme Court, U.S.
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No. 99-415

IN THE SUPREME COURT OF THE UNITED STATES

PETE SNYDER,
Petitioner,

v.

THE UPJOHN COMPANY,
Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

INTRODUCTION

Predictably, Respondent has reacted to the Petition with *ad hominem* personal attacks on Petitioner and misinformation. The personal attacks are irrelevant, and this high Court can certainly resist Respondent's effort to distract them from the central issue through this tactic. The misinformation relates more closely to the central issue of the Petition: whether evidence that a manufacturer has systematically suppressed scientific information about the product should shift the burden under *Daubert* from the consumer to the manufacturer. Respondent asserts that the issue is not raised here because there is no evidence that it engaged in such systematic suppression. In what follows, Petitioner will show that Respondent's claim is flatly untrue.

Finally, however, Respondent has engaged only in diversionary tactics, and has avoided address the central policy issues raised by the Petition: whether evidence of systematic suppression *should* shift the *Daubert* burden.

I. THE TRIAL JUDGE FOUND PRIMA FACIE EVIDENCE OF SYSTEMATIC SUPPRESSION.

Respondent asserts that the trial court made no finding that it systematically suppressed negative information about Halcion (Opp. p. 4).

Respondent is wrong.

As shown in Appendix E to the Petition, the trial court denied Respondent's motion for summary judgment on Petitioner's claim for punitive damages in part on the basis of a sixty-five page FDA report which presents evidence that Respondent set up a committee to "suppress publication of unfavorable data and silence critics (Appendix E, p. 3)."

The trial judge denied Respondent's summary judgment motion because he found that this evidence of systematic suppression of "unfavorable data" created a prima facie case for

punitive damages on the basis that Respondent acted "in conscious disregard of the safety of others."

II. EVIDENCE OF SYSTEMATIC SUPPRESSION SUCH AS THAT PRESENTED HERE SHOULD SHIFT THE BURDEN OF PROOF UNDER *DAUBERT.*

Respondent has attempted to avoid the crucial issue of public policy raised by this Petition by falsely claiming that there was no evidence that it systematically suppressed negative information about Halcion. Petitioner has now shown that to be untrue. The public policy issue is therefore squarely raised here: How can the burden be on the consumer to establish the scientific soundness of his position when the manufacturer has kept the scientific evidence from the public. Respondent has failed to answer that question because there can be only one answer to it. The burden must be shifted, and the Petition should therefore be granted.

CONCLUSION

For the reasons stated above and in the Petition, Petitioner respectfully requests that the writ of certiorari be granted.

Dated: October 15, 1999

Respectfully submitted,
Pete Snyder
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